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In the

Supreme Court of the United States

October Term 1955

No. 318

GEORGE P. DEHARDIT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

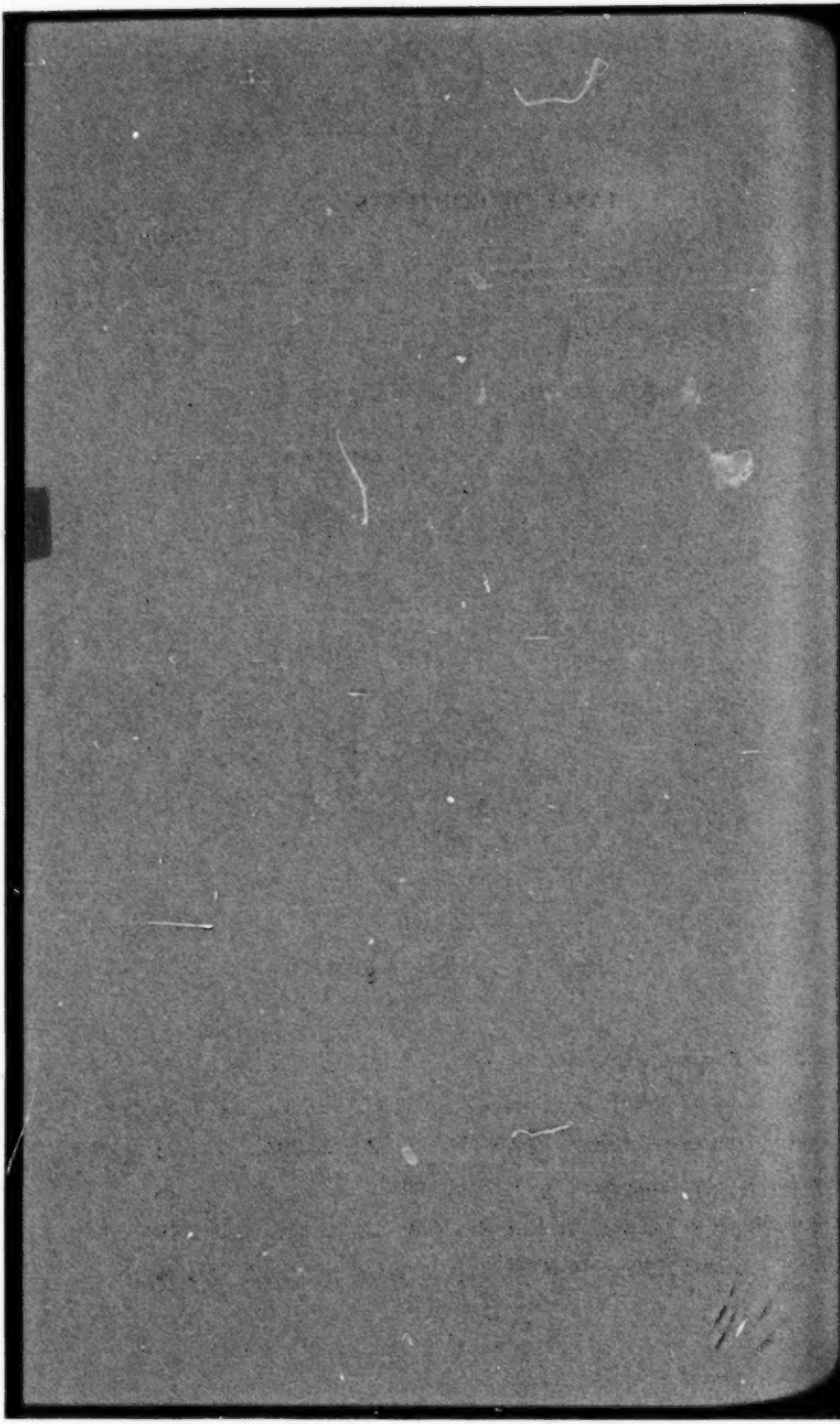
Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

GEORGE P. DEHARDIT
By RICHARD L. WILLIAMS
DAVID NELSON SUTTON
LEITH S. BREMNER
His Attorneys

RICHARD L. WILLIAMS
905 Mutual Building
Richmond, Virginia

DAVID NELSON SUTTON
West Point, Virginia

LEITH S. BREMNER
905 Mutual Building
Richmond, Virginia



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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, George P. DeHardit, respectfully prays for review on a writ of certiorari of the decision of the United States Court of Appeals for the Fourth Circuit, involved in the judgment of said Court entered on the 16th day of July, 1955, in the appeal therein pending wherein your petitioner was appellant and the United States of America was appellee. This judgment affirmed a conviction in the United States District Court for the Eastern District of Virginia, Richmond Division, of your petitioner of the felony of attempting to defeat and evade income taxes for the year 1946. Copies of the record printed below together with the proceedings and opinions in the Courts below have been filed in accordance with the rules of this Court.

REFERENCE TO REPORTED OPINIONS

The opinion of the District Court is reported as *U. S. v. DeHardit,* 120 Fed. Supp. 110. The opinion of the Court of Appeals has not been reported. Copies of both opinions are appended to this Petition in compliance with Rule 23 1 (a).

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is founded upon Section 145(b) of the Internal Revenue Code, 26 U. S. C. A., Section 145(b) and 28 U. S. C. A., Section 1254 (1). The opinion of the U. S. Court of Appeals for the 4th Circuit was filed July 16, 1955.

QUESTIONS PRESENTED

I. Was the summons issued by the Commissioner on March 20, 1953, to the petitioner, on complaint of the District Attorney, in violation of the Fourth Amendment of the Constitution of the United States and, therefore, ineffectual to toll the running of the statute of limitations?

II. Was the prosecution barred by the statute of limitations under Title 26, U. S. C. A., Section 3748, when the complaint was not filed until March 20, 1955?

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U. S. C. A. Constitution, Amendment IV—*Searches and Seizures*

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, sup-

ported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

26 U. S. C. A., Section 145(b)—*Failure to collect and pay over tax, or attempt to defeat or evade tax.*

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

26 U. S. C. A., Section 3748,

"No person shall be prosecuted, tried or punished for any of the various offenses arising under the Internal Revenue laws of the United States unless the indictment is found * * * within three years next after the commission of the offense, except that the period of limitation shall be six years * * * (2) for the offense of wilfully attempting in any manner to evade or defeat any tax or payment thereof * * *

"Where a complaint is instituted before a Commissioner of the United States within the period above limited, the time shall be extended until the discharge of the Grand Jury at its next session within the district."

18 U. S. C. A., Federal Rules of Criminal Procedure.
Rule 4. *Warrant or Summons upon Complaint*

"(a) *Issuance.* If it appears from the complaint that

there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

"(b) *Form.*

(1) *Warrant.* The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place."

Rule 5. *Proceedings before the Commissioner*

"(a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

"(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his

right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

"(c) *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

STATEMENT OF THE CASE

On March 15, 1947, Petitioner, who is fifty-seven years of age and has been a practicing attorney at Gloucester Courthouse, Virginia, since 1921, came to Richmond, Virginia, for the purpose of having his 1946 Federal income tax return prepared and filed. The Petitioner went to the accounting firm of Shepherd, Jackson and Wiggins, State-Planters Bank Building, and gave Ray R. Shepherd, a certified public accountant, the necessary information in order that his tax return could be prepared. Mr. Shepherd prepared a return in longhand, obtained a check from the

Petitioner to cover the balance due on his tax, had the Petitioner sign a blank return, and then gave the longhand return to his secretary, Ruth Timberlake, in order that she could type up the blank return that had been signed by the Petitioner. After the return had been typed up, it was signed by Mr. Shepherd as the party who had prepared it and was dated March 15, 1947. While no one in the accounting firm had any independent recollection of actually mailing the return, the records of the firm show that the return was prepared and mailed in the U. S. Post Office building in Richmond, Va., on March 15, 1947.

While the deadline for filing 1946 income tax returns was March 15, 1947, the tax authorities made a blanket extension of the time for filing until March 20, 1947. Neither the firm of Shepherd, Jackson and Wiggins, their employees nor the Petitioner had any knowledge that the time for filing the 1946 return had been extended. Apparently, the order for the extension was communicated directly to the local Collector of Internal Revenue and no explanation was given as to the reasons for the blanket extension.

S. Thomas Amato, Chief of the Cashier Branch for the District Director of Internal Revenue, when called as a witness by the Government, stated that the Petitioner's return was not received in his office until March 20, 1947, five days after it was mailed, and the return was stamped by Mr. Amato's office with the date, March 20, 1947. No evidence was offered by the Government to explain why it took five days for a tax return deposited in the post office building to be delivered to the Collector's office which, at the time, was located in the Parcel Post Building, a building adjoining the Post Office Building proper.

By leave of Court granted March 9, 1955, Petitioner took the deposition of Fergus McRee, Postmaster of the Richmond Post Office, and he testified, in substance, that

a tax return deposited in the Post Office on March 15, 1947 would be delivered to the addressee, under routine handling procedures of the post office, the following day. When it was brought to Mr. McRee's attention that March 15, 1947, was a Saturday, he revised his estimate of the delivery date to March 17, 1947, because there is no delivery of mail on Sunday.

A. Carter Whitehead, United States District Attorney for the Eastern District of Virginia, in March, 1953, was contacted by the Department of Justice in Washington, D. C., on March 19, 1953, and instructed to file a Complaint against the Petitioner, charging him with income tax evasion. After receiving written confirmation of the Department of Justice's order, Mr. Whitehead prepared a Complaint and appeared before Melvin Flagenheimer, United States Commissioner for the Eastern District of Virginia, on March 20, 1953, and requested that a summons be issued to the Petitioner.

Mr. Whitehead was not questioned by the Commissioner and the summons was issued after he swore to the truthfulness of the facts set forth in the Complaint. Mr. Whitehead had presented a two-count indictment to a Grand Jury in Richmond, Virginia, in April of 1952 in which the Petitioner was charged with the same offense. The Petitioner appeared in person before the Grand Jury in 1952 and was examined by Mr. Whitehead and, thereafter, the Grand Jury returned "not a true bill" in favor of the Petitioner. Apparently, Mr. Whitehead used the information received from the Petitioner when he testified before a Grand Jury in 1952 as the basis for his Complaint in 1953. After the Grand Jury returned "not a true bill" in favor of the Petitioner in 1952, Mr. Whitehead returned his file to Washington, D. C., and did not receive any further instructions from Washington in connection

therewith until he was ordered to file a Complaint on March 19, 1953.

On May 22, 1953, the Petitioner filed a Motion to Dismiss the indictment on the ground that a prosecution was barred by the statute of limitations. On February 8, 1954, the Petitioner filed an Amended Motion to Dismiss upon the grounds: (1) That more than six years had elapsed after the original offense was committed before the indictment was returned; and (2) That a Complaint filed by the United States District Attorney with the United States Commissioner on March 20, 1953 and the summons issued thereon were void and ineffectual to toll the running of the statute of limitations for the reason that such Complaint, on its face, showed that it could not have been made by a person having knowledge concerning the alleged offense other than upon information and belief and that the filing of the Complaint and the issuance of a summons were not authorized by the statutes or the Rules of Criminal Procedure. It was further contended that if the Complaint and summons were filed and issued in accordance with the statutes and rules, such statutes and rules were unconstitutional and void, being in violation of the Fourth and Fifth Amendments of the Constitution. After evidence was taken in connection with the Petitioner's Motions and argument heard by the Court thereon, the Motions were denied in an opinion from the Court dated March 12, 1954.

ARGUMENT AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Point I

The Summons Issued Against the Petitioner by the United States Commissioner on Complaint of the United States District Attorney Was in Violation of the Fourth Amend-

ment to the Constitution of the United States and Was Therefore Ineffectual to Toll the Running of the Statute of Limitations.

It is respectfully submitted that this Honorable Court should grant a writ of certiorari in the instant case in order that the following points of law can be settled.

1. Can a United States Commissioner issue a summons or warrant on complaint of a District Attorney where only conclusionary facts are stated, when the crime involved calls for a specific intent, without making any inquiry of the District Attorney to determine whether he has any actual knowledge of the facts set forth in the Complaint, and

2. Whether or not a summons issued in lieu of a warrant under Rule 4 of the Federal Rules of Criminal Procedure comes under the provisions of the Fourth Amendment to the Constitution of the United States.

While this case arose from an income tax evasion charge, the basic questions to be passed upon and decided by this Court are fundamental rights guaranteed to every citizen by the Constitution of the United States. From a careful search of the authorities, it does not appear that this Court has handed down a decision that satisfactorily sets forth a guide for United States Commissioners in discharging the functions of their office, although what is the proper guide has been a matter of grave concern and disagreement among the District Courts and the United States Courts of Appeal. Moreover, there has never been a decision under Rule 4 of the Federal Rules of Criminal Procedure by any appellate court that decides whether or not warrant and summons are used interchangeably so that both come within the provisions of the Fourth Amendment. It is particularly important that this second question be decided as Rule 4

gives the District Attorney complete discretion in requesting either a summons or warrant and unless the fundamental safeguard provided for in the Fourth Amendment is applied in both cases where the District Attorney requests a summons as well as those cases where a warrant actually issues, there is grave danger that the important constitutional safeguard provided for in the Fourth Amendment will be abrogated completely.

The Fourth Amendment to the Constitution of the United States reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

While no warrant was issued by the Commissioner in this case directing that the Petitioner be arrested, a summons was issued on the District Attorney's Complaint in lieu of a warrant, under Rule 4 of Federal Rules of Criminal Procedure which reads in part as follows:

> "Upon the request of the attorney for the Government, a summons instead of a warrant shall issue."

And it appears clear that "warrant" and "summons" are used interchangeably since both accomplish the same end.

While the Respondent insists that no constitutional safeguard of the Petitioner has been violated in this case because a summons and not a warrant was issued, a reading of Rule 4 of the Federal Rules of Criminal Procedure shows that a warrant and summons are to be regarded as the same.

The title to Rule 4 is "Warrant or Summons upon Complaint" and then Section (a) titled "Issuance" reads:

> "If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the Government, a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue."

Under Section (b) of the Rule titled "Form" the warrant is described as:

> "(1) Warrant. The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner."

And under the same subsection, the summons is described as follows:

> "(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place."

From reading Rule 4, it is apparent that both the warrant and summons have a common generic source, the complaint. And while Rule 4(a) gives the Government attorney the right to request the issuance of a summons instead of a

warrant, it cannot be seriously contended that the Constitutional safeguard provided for under the Fourth Amendment hangs by a thread as slender as the Government attorney's desire in any given case.

Assuming in this case that the District Attorney, because of information within his personal knowledge, had sufficient grounds for requesting that the United States Commissioner issue a summons against the Petitioner, did the Commissioner violate the Petitioner's constitutional safeguard provided for in the fourth amendment by issuing the summons without first questioning the District Attorney?

While the record shows that the District Attorney had some personal knowledge of the facts set forth in the Complaint, this is immaterial as the record does not show that the Commissioner knew or made any effort to determine whether the District Attorney had any personal knowledge of the facts, and the manner in which the Commissioner acted is fully set forth in the record when the Court asked the following question:

> "Q. I understand, Mr. Flagenheimer, that there were no questions asked, nor any statements made by Mr. Whitehead concerning the facts of the case when the Complaint was issued. Is that correct?
>
> A. That is true, sir, except that he swore to the truthfulness of the alleged facts set out in the Complaint."

It is the Petitioner's contention that the validity of the Commissioner's action in issuing a summons or warrant must be tested by what inquiries he made at the time of the issuance to justify his action, rather than what information it appears that the person who prayed issuance of the summons or warrant had at his disposal when an inquiry is made into the matter at a later date. Were this not used

as the test, the Commissioner's historical function as a preliminary judge would be obviated and his office would be converted into an administrative arm of the District Attorney's office. Clearly, a Commissioner cannot pass judgment without making inquiries of those who come before him requesting action from his office.

Since an inquiry must be made into the historical role served by Commissioners and others who discharge comparable offices such as magistrates and justices of the peace, in order that Commissioner Flagenheimer's action can be gauged by the requirements of the fourth amendment to the Constitution, we are taking the liberty to trace the function of the office generally.

Sir Matthew Hale expressed the rule in Hale's Pleas of the Crown, Vol. 2, Chapter XIII, Arrests of Felons Virtute Praecepti, or of Warrants, pages 109 and 110, reads as follows:

> "He may also issue a warrant to apprehend a person suspected of felony, tho the original suspicion be not in himself, but in the party that prays his warrant; and the reason is, because he is a competent judge of the probabilities offered to him of such suspicion.
>
> "And as a constable may upon complaint arrest a person suspected of felony, as appears by what hath been said in the foregoing chapters, so a justice of peace may do the like by his warrant; and it is also the constant practice accordingly.
>
> "But that I may say it once for all, it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, to examine upon oath the party requiring a warrant, as well whether a felony were done, as also the causes of his suspicion, for he is in this case a competent judge of those circumstances that may induce the granting of a warrant to arrest.
>
> "And if there were no other reason to prove it than

this, it were sufficient; namely, that the justice of peace may commit him to gaol that is brought before him for such suspicion, or bail him, as appears by the statutes of 1 R. 3. cap. 3. 3 H. 7. cap. 3. 1 & 2 P. & M. cap. 10. and therefore *a fortiori* may make a warrant to convene or bring him before him to examine the cause of the suspicion."

In Hawkins Pleas of the Crown, Vol. II, p. 134, Chapter XIII—of arrest by public officers, Sgt. William Hawkins expressed the rule as follows:

"Secondly, As to the evidence on which such a warrant is to be granted.

"Sect. 18. It seems probable that the practice of justices of peace, in relation to this matter also, is now become a law, and that any justice of peace may justify the granting of a warrant for the arrest of any person upon strong grounds of suspicion for a felony, or other misdemeanor, before any indictment hath been found against him. Yet inasmuch as justices of peace claim this power rather by connivance than any express warrant of law, and since the undue execution of it may prove so highly prejudicial to the reputation as well as liberty of the party, a justice of peace cannot well be too tender in his proceedings of this kind, and seems to be punishable not only at the suit of the king, but also of the party grieved, if he grant any such warrant groundlessly and maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty.

"Sect. 19. And since both Coke and Hale seem to disapprove of such warrants granted upon suspicion, and the old books seem generally to disallow all arrest for the suspicion of felony made by any other person whatsoever, except the very person who hath the suspicion, it is certainly a safe way of proceeding for him who hath the suspicion, to make the arrest in his proper

person, and to get a warrant from a justice of peace to the constable to keep the peace.

"Sect. 20. And perhaps there may be this difference between the warrant of a justice of peace for such causes which he has not authority to hear and determine as judge without the concurrence of others, and such warrant for an offence which he may so determine without the concurrence of any other, that in the former case, inasmuch as he rather proceeds ministerially than judicially, if he act corruptly, he is liable to an action at the suit of the party, as well as to an information at the suit of the king; but in the latter case he is punishable only at the suit of the king, for that regularly no man is liable to an action for what he doth as judge."

In Chitty's Blackstone, Vol. 2, Chapter 21—of arrest, pages 234 and 235, the function of the justice of the peace is said to be:

"1. A warrant may be granted in extraordinary cases by the privy council, or secretaries of state (a) (2); but ordinarily by justices of the peace (3). This they may do in any cases where they have a jurisdiction over the offence; in order to compel the person accused to appear before them (b); for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace (4); and also to all such offences as they have power to punish by statute (5). Sir Edward Coke indeed (c) hath laid it down that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found; and the contrary practice is by others (d) held to be grounded rather upon connivance than the express rule of law; though now by long custom established. A doctrine which would in most cases give a loose to felons to escape without punishment; and therefore Sir Matthew

Hale hath combated it with invincible authority and strength of reason; maintaining 1. That a justice of peace hath power to issue a warrant to apprehend a person accused of felony, though not yet indicted (e) (6); and 2. That he may also issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to prove the cause and probability of suspecting the party against whom the warrant is prayed."

Thus, it can be seen that running throughout the commentaries of the English writers is the observation that a justice of the peace sits in a judicial role when a person comes before him requesting the issuance of a warrant, and it is respectfully urged that before a justice of the peace or any other person occupying a judicial office can pass judgment, there must be a bona fide inquiry into the matter to be judged.

In American and English Encyclopaedia of Law, 2d, Vol. 30, on warrants, pages 86 and 87, it is said:

> "*Affidavit on Information and Belief—In General.*—Before the warrant can lawfully issue, the magistrate must have evidence of the offender's guilt. A bare statement of the facts and circumstances on information and belief only, without giving any sufficient ground on which to base the belief, is insufficient. An affidavit made solely on information derived from others, whose names are not given, by a person who swears that he has reason to believe, and does believe, that a certain person, naming him, has committed on offense, describing it, is not a sufficient compliance with this provision

> of the constitution. The magistrate, before issuing a warrant, should have before him the oath of the real accuser to the facts on which the charge is based and on which the belief or suspicion is founded."

Coming now to cases decided in the early history of the United States, the first case that we have found touching upon the general question is Ex Parte John Atkins Burford, 1 Cranch's Reports, 1 D. C. Sup. Ct. 275. In this case, Burford was arrested on a warrant issued by several justices of the peace as being a person of ill fame and required to post surety for his good behavior. Upon his failure to post surety, Burford was remanded to prison and he then brought a writ of habeas corpus in the Circuit Court to test the legality of his arrest and confinement. The Circuit Court sustained the commitment with Cranch dissenting on page 278 as follows:

> "The commitment is illegal and is not aided by the warrant for arrest. That warrant is not referred to in the commitment, but if it can be brought in aid of the commitment, yet it ought to have stated the names of the persons on whose testimony it was granted and the nature of the testimony, that this Court may know what kind of ill fame it was, and whether the justices have exercised their discretion properly. The question is, what authority can the jailer show for detaining him. The commitment is his only authority and that is, in my opinion, insufficient."

On appeal to the Supreme Court of the United States, Ex Parte Burford, 3 Cranch's Reports, 447, the commitment was held to be illegal and the prisoner discharged.

In 3 Wood's Reports 502, Circuit Justice Bradley established a rule at the request of the District Judge for the Northern District of Georgia prescribing the duty of Cir-

cuit Court Commissioners in certain cases. The complete ruling on pages 502 through 504 reads:

> "I am informed by his honor, the district judge, that great inconvenience is caused in this district by the arrest of persons charged with offenses against the revenue laws, against whom no sufficient evidence can be produced, either before the grand jury to warrant an indictment, or before the traverse jury to justify a conviction, whereby much useless expense is caused to the government, and the personal liberty of the people is unnecessarily interfered with. One cause of this evil seems to be the fact that warrants are issued upon the affidavit of some officer, who, upon the relation of others, whose names are not disclosed, swears that, upon information, he has reason to believe, and does believe, the person charged has committed the offense charged. The district judge, not being satisfied that this is a sufficient ground for issuing a warrant of arrest, has desired my advice in the matter. After examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the constitution, which, by the fourth article of the amendments, declares that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and that no warrants shall issue but upon probable cause, supported by oath or affirmation, describing the place to be searched and the persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other

words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt is founded. The magistrate can then judge for himself, and not trust to the judgment of another, whether sufficient and probable cause exists for issuing a warrant.

"It is possible that by exercising this degree of caution, some guilty persons may escape public prosecution, but it is better that some guilty ones should escape than that many innocent persons should be subjected to the expense and disgrace attendant upon being arrested upon a criminal charge, and this was undoubtedly the beneficent reason upon which the constitutional provision referred to was founded.

"In view of these considerations, and to correct the evil alluded to, we have prepared and now make the following general order for the guidance of the commissioners of this court, in the manner of issuing warrants of arrest against persons charged with crime, to-wit:

"No warrant shall be issued by any commissioner of this court for the seizure or arrest of any person charged with a crime or offense against the laws of the United States upon mere belief, or suspicion of the person making such charge; but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge constituting the grounds for such a belief or suspicion."

In *U. S.* v. *Tureaud,* 20 Fed. Reports 621, the general subject here under consideration was discussed in detail by Mr. Justice Billings and the rules heretofore enunciated in Ex Parte Burford, *supra,* and the rule established by Mr. Justice Bradley (3 Wood's 502) were quoted at length and followed.

In *U. S.* v. *Dolan,* 113 F. Supp. 757, the defendant was charged with income tax evasion for the year 1946 and moved to dismiss the indictment on the ground that the six-year statute of limitations had run. The United States took the position that while the indictment was filed on March 20, 1953, a sworn and written Complaint was filed on March 13, 1953, and that the last paragraph of 26 U. S. C. A., Section 3748 tolled the running of the statute of limitations. The defendant attacked the form of the Complaint and the Court, on page 761, discussed the Commissioner's duties as follows:

> "Thus is raised a question of statutory interpretation which is not as simple as a first glance would indicate. By the institution of a complaint does the Statute mean merely the presentation to the Commissioner of a sworn writing sufficient in content to satisfy the definition of a complaint contained in Rule 3, 18 U. S. C. A.? An interpretation of such scope, I think, should be rejected. It overlooks the fact that not every complaint presented to a Commissioner is automatically filed by him and accepted by him as a proper foundation instituting a criminal prosecution. The Commissioner's duties on such an occasion are outlined in a Commissioner's Manual prepared originally by a Committee of the Judicial Conference in 1943 and in 1948 revised by the Director of the Administrative Office, U. S. Courts, to incorporate changes necessitated by the adoption of the Federal Rules of Criminal Procedure. In the revised manual, Page 5, it is stated:
>
> " 'The complaint is not necessarily filed on the mere request or suggestion of an investigating officer or other person. On the contrary, the commissioner should always examine on oath the person making the complaint as well as any witness who may appear before him. The commissioner should reduce the complaint to writing

and require it to be dated, signed, and sworn to by at least one complainant and filed with him * * *

" 'The procedure and prerequisites for issuance of a warrant of arrest by a commissioner are governed by Rule 4 of the Rules of Criminal Procedure. Since the complaint is the foundation for issuance of the warrant the commissioner should assure himself that the complaint shows probable cause for belief that a crime was committed and that the persons for whom the warrant is sought committed it.'

"These provisions, I think, correctly recognize that the United States Commissioner is a judicial outpost in our constitutional structure of defense against arbitrary executive action. In our system of criminal administration he is often the first judicial officer responsible for the enforcement of the Fourth Amendment prohibiting the issuance of warrants 'but upon probable cause, supported by Oath or affirmation'. In the discharge of this high responsibility, he is required to reject a complaint and refuse a warrant of arrest unless satisfied that there is probable cause therefor.

"In the discharge of this task a frequent difficulty with which a commissioner will find himself confronted arises when the complaint alleges, as I think it properly may, United States v. Walker, 2 Cir., 197 F. 2d 287, facts essential to the offense which are essentially the conclusions or inferences of the complainant from underlying facts. This difficulty is presented when the complaint alleges as a fact the defendant's state of mind—as here it charges that he *fraudulently with intent to evade* filed a tax return. To such cases particularly the provision of the manual above quoted have pertinence, and the commissioner should not accept the complaint as instituting a criminal prosecution until by examination under oath of at least one witness he finds probable cause for believing the existence of one or more underlying facts from which in their context the ultimate inference might reasonably be made. (Authorities cited)."

And further on pages 761 and 762, the Court said:

"This recognition of the responsibilities of the Commissioner sheds light on the interpretation to be accorded to the statutory toll. The Statute, Section 3748, by its general provisions is tolled by an indictment or information. An indictment and an information may properly be entertained only on a finding by the appropriate judicial authority of probable cause. Thus it is reasonable to interpret its exceptive provision for cases 'where a complaint is instituted before a commissioner of the United States within' the prescribed period, to refer to a complaint actually presented to a commissioner for his *formal* action which he properly found to be supported by probable cause.

"If, as I hold, such be the proper interpretation of the Statute, it is apparent that on the showing made on this motion the defendant cannot prevail upon its contention that the complaint by reason of its content was ineffective to toll the Statute. The court file shows that the complaint was in fact instituted before the Commissioner; for upon the complaint he issued a warrant of arrest. His action thus imports that he at least was satisfied that the complaint was based on probable cause and there is no basis whatever for a finding that the complaint was not instituted.

"My holding is not at all inconsistent with the doctrine of Rice v. Ames, 180 U. S. 371, 377, 21 S. Ct. 406, 45 L. Ed. 577, and the cases stemming therefrom which defendant cites. These cases turn upon the distinction between complaints which on their face are made only on information and belief and those in which the complaining witness swears to facts—even conclusionary facts—absolutely without qualification. In none of these cases did the Court have occasion to define complaints which were 'instituted before a commissioner' within the meaning of Section 3748, which is the problem here. They hold only that a charge made

> solely on information and belief, even if in form sworn to, is nothing more than an allegation of a belief held by the witness,—which of course is not in itself the statement of an act constituting an offense, or the element of an offense, done by the defendant. However that may be those cases are not germane to any problem here because (a) upon the record here it does not appear that the complaint was made only on information and belief and without probable cause, and (b) they do not purport to construe Section 3748."

While Judge Hincks apparently recognized the rule that there is a duty on a Commissioner to demand more than just a bare Complaint, the record in the *Dolan* case did not show the mechanics by which the summons was issued on the Complaint. However, in the instant case, the record shows conclusively that the Commissioner issued a summons at the request of the District Attorney when the Complaint was presented without making any inquiry as to whether there was any foundation for the conclusionary facts set forth in the Complaint at all.

In *U. S.* v. *Langsdale,* 115 F. Supp. 489, the Court had occasion to pass upon the identical issue before the Court in this case and, in holding that a Complaint filed by an Assistant District Attorney who did not have sufficient personal knowledge to sign the Complaint, was not sufficient to toll the running of the statute of limitations in an income tax evasion case. The District Judge in the *Langsdale* case quoted with approval the following rule from *U. S. ex rel. King* v. *Gokey* (D. C.), 32 F. 2d 793, at page 794:

> "Consideration is first given to that part of the second ground or claim of illegal detention; i.e., that the complaint is insufficient at law to confer jurisdiction. The Commission of a crime must be shown by facts

positively stated before a commissioner has jurisdiction to issue a warrant of arrest. This protection is guaranteed to every person by the Constitution (Fourth Amendment) through the provision that 'no warrant shall issue, but upon probable cause, supported by oath or affirmation.' This safeguard of liberty has been jealously protected by all courts. And well it should be, for it would be intolerable to allow a warrant of arrest to be issued upon the opinion, conclusion, or suspicion of some person, unsupported by facts. The 'oath or affirmation' required is of facts, not opinions or conclusions. The complaint must be supported by proof, so that the magistrate may exercise his judgment or discretion in determining that an offense has been committed, and that there is probable cause to believe the accused guilty of the commission thereof. If the complaint is made on information and belief, it must give the grounds of belief and sources of information. *A complaint not based upon the complainant's personal knowledge, and unsupported by other proof, confers no jurisdiction upon the commissioner to issue a warrant.* (Authorities cited)."

Both the early English writers and the case decisions in the United States are unanimous in stating that the Commissioner or Magistrate sits in judgment and must base his actions upon information presented to him by the complaining party. It is respectfully submitted that Commissioner Flagenheimer violated this basic function of his office, when, by his own admission, he issued a summons against the Petitioner without making any inquiry of the District Attorney who presented the Complaint. If the action of Commissioner Flagenheimer is upheld herein, the historical function of the Commissioner's office has been abolished and the Commissioner will now be at liberty to serve as an adjunct to the District Attorney's office in that

to accomplish administrative expediency a constitutional safeguard has been sacrificed.

Point II

The Court Erred in Denying Petitioner's Motion to Dismiss the Indictment on the Ground That the Alleged Offense Was Barred by Title 26, U. S. C. A. Section 3748.

After the Petitioner was indicted herein, a Motion to Dismiss was filed in his behalf based upon the grounds that the alleged offense was barred by Title 26, U. S. C. A., Section 3748, which, in part, reads as follows:

> "No person shall be prosecuted, tried or punished for any of the various offenses arising under the Internal Revenue laws of the United States unless the indictment is found * * * within three years next after the commission of the offense, except that the period of limitation shall be six years * * * (2) for the offense of wilfully attempting in any manner to evade or defeat any tax or payment thereof * * *
>
> "Where a complaint is instituted before a Commissioner of the United States within the period above limited, the time shall be extended until the discharge of the Grand Jury at its next session within the district."

The law seems clear that where the defendant in a criminal action pleads the statute of limitations, the prosecution has the burden of proving the commission of the offense within the statutory period. The general rule is succinctly stated in 13 A. L. R. 1446, as follows:

> "It is well settled that where the issue of the statute of limitations is raised in a criminal case, the state must affirmatively prove the commission of the offense within the statutory period."

It is further generally recognized that statutes of limitations in criminal cases differ from such statutes in civil cases, in that in civil cases they are statutes of repose, while in criminal cases they create a bar to the prosecution. 1 Wharton Criminal Procedure, 10th Ed., Sec. 367, p. 415; 17 R. C. L., Sec. 56, p. 704.

This rule was recognized in *White* v. *U. S.*, 216 F. 2d 1, where the defendant was adjudged guilty of income tax evasion for the year 1945 in the United States District Court for the Eastern District of Louisiana and appealed to the United States Circuit Court of Appeals for the Fifth Circuit on three grounds, one being that the prosecution was barred by the statute of limitations. The District Court had ruled that although the information against the defendant was filed more than six years after the alleged commission of the offense, a Complaint had been filed on March 1, 1952, fifteen days before the statute of limitations ran and, therefore, under Title 26 U. S. C. A., Sec. 3748, the running of the statute of limitations was tolled. While the proceedings before the Commissioner were not a part of the record on appeal, the Court held that the District Judge could take judicial notice of the hearings before the Commissioner where the papers had been transmitted to the Clerk of the District Court. After denying the defendant relief on the question of the statute of limitations, the Court reversed the judgment of the District Court and remanded the case for a new trial on another ground. Thereafter, the defendant petitioned the Court for a re-hearing on the ground that the Court erred in construing Rule 5(c) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., and that the motion for judgment of acquittal should be sustained. In denying the defendant's petition for re-hearing, the Court made the following observations on the question of the statute of limitations in a tax evasion case on page 8:

"Under that situation, to toll the statute of limitations it was necessary for the Government to prove by evidence properly introduced before the jury that a complaint was instituted before a Commissioner of the United States within the limitation period and that the time when the present information was instituted was before the discharge of the grand jury at its next session within the district, 26 U. S. C. A., Sec. 3748. The defendant of course, had a right, if he could, to controvert any such evidence and to prove contrary facts.

"(10) It does not follow, however, that this Court is now required to direct a judgment of acquittal. Upon reversal of a District Court for its denial of a motion for judgment of acquittal, this Court may direct a new trial if 'just under the circumstances', 28 U. S. C. A., Sec. 2106; *Bryan* v. *United States*, 338 U. S. 552, 70 S. Ct. 317, 94 L. Ed. 335. The tolling of the statute of limitations may depend upon questions of fact to be determined on another trial. The judgment remains reversed and the case remanded for a new trial, and the petition for rehearing is Denied."

The Court's ruling on the petition for rehearing in the *White* case conforms to the general rule that the prosecution has the burden of proving that an action brought for income tax evasion is not barred by the statute of limitations.

While evidence was taken on the question of the statute of limitations after Petitioner's Motion to Dismiss was filed herein, the record shows that the point was never considered by the Court from the standpoint of the burden being on the United States to show that the offense was committed within the statutory period. In fact, at one stage in the proceedings, the District Attorney stated that the burden was on the Petitioner to sustain his defense of the statute of limitations and further proceedings were held on that basis.

From a reading of the Court's finding of facts that appear in the opinion proper, it is readily seen that a determination was made on this point in the absence of a full understanding by the Court of the applicable rule. There was a conclusive finding that the Petitioner's income tax return for 1946 was prepared and filed on March 15, 1947, but that the return was not received until March 20, 1947, the last day which the return had to be received to save the action from the statute of limitations, even under the Government's view. These conclusive findings were made in the face of undisputed evidence that the Collector's office was located in the Parcel Post Building at the time, which is adjacent to the Post Office Building proper and, in fact, the two buildings are connected by a tunnel through which mail deliveries are made. Clearly, the Court's finding on these points is incompatible in the absence of any explanation for a five-day delivery period in a situation where it is a matter of common knowledge that deliveries are made in one or two days. After the Court was advised of this inconsistency, leave was granted to the Petitioner to supplement the record with evidence from personnel of the Post Office Department. In this connection, the deposition of Fergus McRee, Postmaster of the Richmond Post Office, was taken and he testified without equivocation that the time for delivering a tax return from the post office in Richmond to the Collector's office would be one day around March 15, 1947. In other words, if a return was mailed on March 15, 1947, in the post office, it would normally be delivered on March 16, 1947. When Mr. McRee was advised that March 16, 1947, was a Sunday, he revised his estimate of the delivery date until March 17, 1947, as there is no delivery of mail on Sunday. While the Trial Judge would not reconsider the question of the statute of limitations after Mr. McRee's deposition was taken, the mere fact

that leave was granted to supplement the record with additional evidence on the time necessary to effect a delivery of the Petitioner's return indicates some doubt in the District Judge's mind as to the validity of his findings of fact on that point. Moreover, the Court granted leave for the taking of additional evidence after it had been pointed out that the burden of proof on the question of the statute of limitations was on the Government. Certainly, this Honorable Court should not hesitate to correct a patent error when the opportunity presents itself, even though it may mean disturbing a finding of fact by the lower Court or directing the lower Court to hear further evidence and make a new determination. It might also be pointed out that the District Attorney's office took the position soon after the Petitioner's Motion to Dismiss the Indictment was filed that his absence from the District for a few days on routine business matters tolled the running of the statute of limitations. This attitude on the part of the District Attorney further indicates that there was a grave doubt in the Government's mind as to whether the action against the Petitioner was timely brought.

In order that the Petitioner's position on this point will be clear, we again say that it was physically impossible for the return not to have been received before March 20, 1947, if, as the Court found without contradiction, the return was mailed at the post office building in Richmond on March 15, 1947. This conclusion is inescapable on the face of the record, apart from any consideration of the rules of evidence governing the burden of proof where the statute of limitations has become an issue in a criminal case.

CONCLUSION

It is respectfully submitted that the Fourth Amendment to the Constitution of the United States was violated when a summons was issued to the petitioner herein by the United States Commissioner when no bona fide inquiry was made by the Commissioner when the District Attorney appeared before him in this case. Moreover, the findings of fact made by the District Judge are patently wrong and this Honorable Court should grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review these errors.

Respectfully submitted,

GEORGE P. DEHARDIT
By RICHARD L. WILLIAMS
DAVID NELSON SUTTON
LEITH S. BREMNER
His Attorneys

RICHARD L. WILLIAMS
905 Mutual Building
Richmond, Virginia

DAVID NELSON SUTTON
West Point, Virginia

LEITH S. BREMNER
905 Mutual Building
Richmond, Virginia

CERTIFICATE OF SERVICE

I, Richard L. Williams, one of the attorneys for George P. DeHardit, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of August, 1955, I served copies of the foregoing Petition for a Writ of Certiorari on the parties thereto as follows:

1. On the United States of America by mailing true copies thereof in a duly addressed envelope with postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.; L. S. Parsons, Esquire, United States District Attorney, Norfolk, Virginia; and to James R. Moore, Esquire, First Assistant United States Attorney, Post Office Building, Richmond, Virginia.

The record being used in connection with this Petition for a Writ of Certiorari has been forwarded to the Clerk of the Supreme Court of the United States by the Clerk of the United States Court of Appeals for the Fourth Circuit and nine copies of the Appendix of both petitioner and respondent are on file in this Court.

RICHARD L. WILLIAMS
905 Mutual Building
Richmond, Virginia

APPENDIX OF OPINIONS

Opinion of the United States District Court

On April 9, 1953, the grand jury, at Richmond, returned an indictment charging the defendant with a violation of Title 26, Section 145(b), U. S. C. A. Specifically, the indictment, which contains one count, recites that the defendant "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Virginia at Richmond, a false and fraudulent income tax return * * *."

On May 22, 1953, the defendant filed a motion to dismiss the indictment upon the ground that a prosecution is barred by the statute of limitations. On February 8, 1954, the defendant filed an amended motion to dismiss based upon two grounds: (1) that more than six years had elapsed after the alleged offense was committed before the indictment was returned; and (2) that a complaint filed by the United States Attorney with the United States Commissioner on March 20, 1953, and the warrant issued thereon were void and ineffectual to toll the running of the statute of limitations for the reason that such complaint on its face shows that it could not have been made by a person having knowledge concerning the alleged offense other than upon information and belief and that the filing of the complaint and issuance of a warrant were not authorized by the statute or Rules of Criminal Procedure. It is further contended that if the complaint and warrant were filed and issued in accordance with the statutes and rules, such statutes and rules are unconstitutional and void, being in violation of the

Fourth and Fifth Amendments to the Constitution. As will be noted later, no warrant was issued but the Commissioner did issue a summons and at the argument of the motion the defendant took the position that the summons was ineffectual to suspend the running of the statute of limitations. The respective motions will be treated as one and referred to as the defendant's motion. A hearing was held at which evidence was introduced by the defendant in support of the motion and by the Government in opposition.

Evidence introduced by the defendant showed the following facts which I find proven: On March 15, 1947, the defendant came to the office of a local accounting firm in Richmond where he furnished an accountant information necessary to prepare his income tax return for the calendar year 1946. The return was prepared and signed by the defendant in the accountant's office and the defendant delivered to the accountant his check to cover the tax computed to be forwarded with the return to the Collector. The accountant, after affixing his signature as the person who prepared the return, delivered it to an employee of his firm to be mailed. After signing the return and supplying the accountant with the check, the defendant left the office to return to his home approximately fifty miles from Richmond. While no one in the office of the accounting firm had any independent recollection of actually placing the return in the mail, the records of the office indicate that it was placed in the Post Office in Richmond on March 15, 1947, in an envelope addressed to the Collector, at Richmond. This proof convinces me that the return was actually placed in the Post Office in Richmond on March 15, 1947.

Testimony introduced by the Government shows that the return was actually received in the Collector's Office in Richmond on March 20, 1947. While no one was able to

testify as to the actual receipt of the return, it was shown that the practice of the office of the Collector at that time was to separate the mail received in the period around March 15 according to the date on which it came into the office and to mark the various bundles of mail with the date of receipt. Later when the envelopes were opened each return was stamped as received on the date corresponding to that shown. The receipt stamp of the Collector shows that this return was received on March 20, 1947. The evidence causes me to conclude that the return was actually received in the Collector's office on the last mentioned date.

The return having been made on the basis of the calendar year was required to be filed on or before the 15th day of March, 1947. Title 26, Section 53(a)(1). However, subsection (2) of the last mentioned statute provides that the Commissioner of Internal Revenue may grant a reasonable extension of time for filing returns under the rules and regulations approved by the Secretary of the Treasury and it was testified that for the specific year in question a return received on March 20 was regarded administratively as being filed within the time limit. It might be remarked in passing that the terms "make" and "filed" as used in the statute appear to have been considered as synonymous. See also *Wampler* v. *Snyder, infra.*

As previously mentioned, the indictment charges the defendant with an attempt to defeat and evade a part of the tax by "filing and causing to be filed * * * a false and fraudulent income tax return". Title 26, Section 145(b) makes it an offense to wilfully attempt in any manner to evade or defeat any tax. Since the alleged fraudulent act is the filing and causing to be filed, it is necessary to first determine whether the return was filed on March 15, when mailed, or within a time thereafter prior to March 20, or on

March 20, when received at the Collector's office. If filed prior to March 20, 1947, the statute of limitations is applicable unless the absence of defendant from the District for a short period in 1947, later referred to herein, would suspend its operation.

It is the contention of the defendant that the act of filing was complete when the return was mailed, while the Government contends that there was no filing until the return was received.

The defendant relies upon *Spies* v. *United States,* 317 U. S. 492. From a careful examination of that case it is my conclusion that it does not support this contention. While the Court, by way of illustration, refers to a number of acts which may constitute a fraudulent attempt to evade the payment of taxes, as I understand the opinion the question decided was whether there must be an act of commission rather than of omission to make the offense there charged a felony. It is to be remembered that the offense here charged is an act of commission, namely, filing or causing to be filed.

There are a number of cases which appear in point. In *United States* v. *Lombardo,* 241 U. S. 73, the defendant was required to file with the Commissioner of Immigration a statement or report under what is known as the White Slave Traffic Act. The office of the Commissioner General of Immigration was in Washington, D. C. An indictment was returned in the District Court of the United States for the Western District of the State of Washington, charging the defendant with failure to file the return as required by statute, the acts making such return or report necessary having occurred in the City of Seattle, Washington. The District Court sustained a demurrer, one of the grounds being that the Court was without jurisdiction because the offense was not committed in the District in

which the indictment was found. The Supreme Court, in affirming the action of the District Court, limited its consideration of the appeal to the action of the District Court relative to jurisdiction. The following language of the District Court was quoted with approval by the Supreme Court:

> Filing, it must be observed, is not complete until the document is delivered and received. "Shall file" means to deliver to the office and not send through the United States mails. * * * A paper is filed when it is delivered to the proper official and by him received and filed. * * *. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act.

In *Wampler* v. *Snyder,* 66 Fed. (2d) 195, the Court of Appeals for the District of Columbia had before it, in a habeas corpus proceeding, the contention that the District Court of Maryland was without jurisdiction in a case involving an indictment returned in that District, charging an attempt to evade payment of taxes by filing a false return with the Collector of Internal Revenue at Baltimore because the petitioner had placed his return in the United States mail in Washington for delivery in Baltimore and therefore any offense committed occurred in the District of Columbia. The statute required residents of the District of Columbia to make tax returns to the Collector in Baltimore. In disposing of the question the Court said:

> "The words 'shall be made', as used in the statute, are the equivalent of 'shall be filed', and to file a paper is to deliver it at the place where it is to be lodged and kept. When the mails are utilized for this purpose, the filing takes place upon delivery at the office of the

official required to receive it." Citing United States v. Lombardo, supra, and cases cited.

In *Bowles* v. *United States,* 73 Fed. (2d) 772 (4th Cir.), an indictment was returned in the District of Maryland, containing four counts, charging the defendant who was a resident of the District of Columbia, under the first count with failure to make an income tax return for the year 1930, under the second count with attempting to evade payment of tax for that year by failing to make a return, and under the third and fourth counts with a wilful attempt to defeat and evade payment of tax for 1931 by filing a false and fraudulent return. Thus it will be seen that the first two counts charge acts of omission and the remaining counts charge acts of commission. It was conceded that the defendant was not personally in the State of Maryland at any time relative to the counts charging failure to file returns and that the return which was filed was prepared and filed with the person in charge of the local or branch office of the Collector situated in the City of Washington and in due course transmitted to the principal office at Baltimore. The Court said:

> "The defendant being a resident of the District of Columbia, it became his duty to make his income tax return to the Collector at Baltimore, Md., and failure to make such return constituted an offense within the District of Maryland." Citing United States v. Lombardo, supra.

In dealing with the acts of commission the Court said:

> "The crime charged in the third and fourth counts was the filing of a false return. The offense was committed at the place where the filing took place upon the delivery at the office of the Collector in Baltimore.

Wampler v. Snyder, 62 App. D. C. 215, 66 F. (2d) 195.

"The offenses having been committed in the State of Maryland where the Collector's office is located and where the return should be filed, it follows that the District Court of the United States for the District of Maryland had jurisdiction of the offenses charged."

Reass v. *United States,* 99 Fed. (2d) 752 (4th Cir.), involved the question as to whether venue was properly laid in West Virginia or in Pennsylvania. The indictment which was returned in West Virginia charged the defendant with knowingly making false statements concerning an application for a loan from the Federal Home Loan Bank. The facts were that the defendant prepared certain statements in West Virginia and took them in person to Pittsburgh where they were filed in accordance with requirements then in effect. The Court used the following language:

"The mere assembling of the material and its arrangement in a written composition containing the misrepresentations of fact can have no effect, and it is only when they are communicated to the lending bank that the crime takes place. It follows that the acts performed by the defendant in Wheeling, although preparatory to the commission of the crime, were no part of the crime itself. That took place entirely in Pittsburgh where the writing previously prepared was presented to the bank."

It is true that the Court expressly stated that it had no occasion to consider whether the offense would have been cognizable in West Virginia if the applications had been sent from there by mail.

In *United States* v. *Newton,* 68 Fed. Supp. 952, Judge Barksdale had for consideration the jurisdiction of the Court for the Western District of Virginia in a prosecu-

tion against a resident of Danville who was charged with aiding, assisting, advising, etc., in the preparation of a fraudulent claim based upon amended income tax returns. Since the office of the Collector of Internal Revenue for the District of Virginia is located at Richmond in the Eastern District, the defendant contended that the Court for the Western District was without jurisdiction upon the theory that the crime, if any, was committed in the Eastern District, at Richmond, where the returns and claims were filed. The Court pointed out that the defendant was not charged with filing or presenting the claim and in discussing what constitutes filing, used the following language:

> "However, in my opinion, the fact of the filing or presentation of the false claim with the collector, is an essential element of the crime in the sense that the filing or presentation by somebody is a necessary element of proof, because the document does not become a claim or return until so filed."

And further:

> "* * * no matter how formally and completely a fraudulent document might be prepared, it would not be a 'return' or 'claim' unless and until it were filed with, or presented to, a government official such as a Collector of Internal Revenue." (Affirmed 162 Fed. (2d) 795.)

Oppenheimer v. *Commissioner,* 16 T. C. 515, lays down a principle with respect of liability of a taxpayer to a penalty for failure to file a timely return. Considering the wellnigh universal use of the mails in connection with business affairs, including filing the multitudinous reports and returns required by various governmental agencies, the rule there announced is clearly sound. However, it is to be remembered

the rules of evidence applicable in civil cases apply there. The case now before this Court is a criminal prosecution. Every element of the offense must be proved, including the act of filing. While the statute requires that return be made on March 15, as previously pointed out the Commissioner may extend that time. In this instance a blanket extension was granted. In any event, the fact that a return was not filed at the required time does not nullify the return.

It is my conclusion that if an offense was committed in the case at bar the time of such commission was March 20, 1947, the date upon which the return was actually received in the office of the Collector.

Since the date of the alleged offense was March 20, 1947, the six-year statute of limitations began to run on that date and a prosecution under an indictment returned on April 9, 1953, is barred unless the period has been extended.

Title 26, Section 3748, U. S. C. A., provides:

> "No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the Internal Revenue laws of the United States unless the indictment is found * * * within three years next after the commission of the offense, except that the period of limitation shall be six years * * * (2) for the offense of willfully attempting in any manner to evade or defeat any tax or payment thereof, * * *."

That section further provides:

> "Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district."

The Government contends that the filing of the complaint by the United States Attorney with the Commissioner on

March 20, 1953, was within the six-year period and therefore the running of the statute of limitations was tolled until the discharge of the grand jury at its next session within the District. The next session of the grand jury commenced on April 6, 1953, and was not discharged until October 5, 1953. As before stated, the indictment was returned on April 9 of that year. There is a further contention by the Government that an absence of the defendant from the District for eighteen days in 1947 suspended the running of the statute of limitations.

Thus it will be seen that the effect of the filing of the complaint on March 20, 1953, is vital to the Government's case. Title 18, Section 3045, U. S. C. A., provides for issuance by United States Commissioners of warrants for arrest for violations of Internal Revenue laws upon the complaints of certain persons, including a United States Attorney. Rule 4 of Federal Rules of Criminal Procedure concerning the issuance of a warrant or summons provides, in part:

> "Upon the request of the attorney for the Government a summons instead of a warrant shall issue."

The defendant attacks the complaint upon the ground that it was filed by the United States Attorney on instructions from the Department of Justice and that the United States Attorney did not have sufficient personal knowledge of the alleged offense to justify the filing of the complaint and the issuance of a warrant by the Commissioner, and further that no warrant was issued as required by law.

At the hearing A. Carter Whitehead, Esquire, who was United States Attorney at the time and who has since resigned, appeared in response to a subpoena and testified that he filed the complaint and he had personal knowledge

of the facts stated in the complaint concerning the alleged offense. He further stated in general terms the source and manner in which he had acquired that knowledge. He was not examined in detail regarding the facts in his possession by either Government counsel or the defense. No evidence contradicting his testimony was offered.

The Commissioner testified that the United States Attorney presented to him the written complaint and verified the facts there stated under oath. The Commissioner did not question the United States Attorney and held no hearing before issuing the summons. He stated further that the summons, instead of a warrant, was issued at the request of the United States Attorney.

At the hearing it was argued by counsel for the defendant that since the information in possession of the United States Attorney was not stated orally and in detail to the Commissioner at the time the complaint was filed, the issuance of a warrant was not justified. Rule 4 of the Rules of Criminal Procedure provides, in part:

> "If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it."

The summons was issued on the complaint in this case and under the rule laid down in the case of *Gracie* v. *United States, infra,* I think this sufficient.

I find that under the facts here shown the United States Attorney had sufficient knowledge of the alleged offense to justify him in filing the complaint and the Commissioner was justified in issuing the summons. This ruling is not in conflict with *United States* v. *Langsdale,* 115 Fed. Supp.

489. There the evidence reveals that the United States Attorney was not possessed of sufficient knowledge of the facts to justify filing the complaint. I concur in the principles announced in the Langsdale case and nothing here said is to be construed as approval of filing a complaint without sufficient knowledge of the facts.

Under the facts of this case there was no violation of the defendant's rights under the Fourth and Fifth Amendments of the Constitution of the United States. Rule 4, previously quoted, so clearly provides for the issuance of a summons instead of a warrant at the request of the Attorney for the Government, as was done in this case, I do not consider it necessary to discuss the point further. It is clear that the substitution of the summons caused no hardship to the defendant. The warrant directs his arrest. The summons merely directs his appearance before a Commissioner. Probable cause supported by oath justified the issuance of a warrant. It also justified the issuance of a summons.

Aside from the foregoing considerations a complaint and the action of the Commissioner thereon are prima facie valid. The burden of showing invalidity rests upon the defendant. See *Gracie* v. *United States,* 15 Fed. (2d) 644.

It follows that the statute of limitations was extended by the filing of the complaint and it is unnecessary to dispose of the Government's contention concerning the defendant's absence from the District for approximately eighteen days in 1947.

An order may be prepared by the United States Attorney overruling the motion and after endorsement by counsel for defendant presented for entry.

STERLING HUTCHESON
United States District Judge

March 12, 1954

Opinion of the U. S. Court of Appeals For the Fourth Circuit

SOPER, Circuit Judge:

George P. DeHardit, a practicing attorney of long experience at Gloucester Court House, Virginia, was convicted of wilfully and knowingly attempting to defeat and evade a large part of the income tax owing by him to the United States for the year 1946 by filing a false and fraudulent income tax return. He was sentenced to serve an imprisonment of one year and to pay a fine of $5,000; and he has appealed to this court solely on the ground that the prosecution was barred by limitations under the terms of 26 U. S. C. § 3748, in that it was not instituted within six years after the commission of the offense.

The crime was committed when the fraudulent return was filed with the Collector of Internal Revenue at Richmond, Virginia. The defendant contends that the return was filed not later than March 17, 1947 and that the prosecution was begun more than six years later on March 20, 1953 when the United States Attorney filed a sworn complaint with the United States Commissioner and requested him to issue a summons to the defendant. The position of the Government is that the return was not actually received at the office of the Collector until March 20, and hence the prosecution was begun in time since the time elapsed between the commission of the offense and the institution of the prosecution is calculated by omitting the day on which the offense occurred, and including the day on which the prosecution is begun.* The statute provides that where, as in this case, a complaint is instituted before a Commissioner

*United States v. Mathis, D.C.N.J., 28 F. Supp. 582; Wiggins v. United States, 9 Cir., 64 F. 2d 950, cert. den. 290 U.S. 657; Burnet v. Willingham L. & T. Co., 282 U.S. 437.

of the United States within the period of limitations, the time shall be extended until the discharge of the Grand Jury at its next session within the District. The next session of the Grand Jury in this case began on April 6 and ended October 5, 1953. The indictment was filed by the Grand Jury on April 9, 1953.

An alternative contention of the defendant is that the summons issued by the United States Commissioner on March 20, 1953 was in violation of the Fourth Amendment and therefore void, because it was not based upon probable cause supported by oath or affirmation, and hence the prosecution was not begun until the indictment was found by the Grand Jury. The position of the United States on this point is that the provisions of the Fourth Amendment are directed to the issuance of warrants for the search of houses and effects and the seizure of persons, and that no warrant but only a summons was issued in this case, and that in any event the action of the Commissioner was based upon probable cause supported by the oath of the United States Attorney who had personal knowledge of the facts.

These questions were brought to the attention of the District Judge by a motion of the defendant to dismiss the indictment as barred by limitations and evidence was taken. The District Judge filed a carefully prepared opinion in which he made the following findings with respect to the date on which the income tax return was filed. He said:

"Evidence introduced by the defendant showed the following facts which I find proven: On March 15, 1947, the defendant came to the office of a local accounting firm in Richmond where he furnished an accountant information necessary to prepare his income tax return for the calendar year 1946. The return was prepared and signed by the

defendant in the accountant's office and the defendant delivered to the accountant his check to cover the tax computed to be forwarded with the return to the Collector. The accountant, after affixing his signature as the person who prepared the return, delivered it to an employee of his firm to be mailed. After signing the return and supplying the accountant with the check, the defendant left the office to return to his home approximately fifty miles from Richmond. While no one in the office of the accounting firm had any independent recollection of actually placing the return in the mail, the records of the office indicate that it was placed in the Post Office in Richmond on March 15, 1947, in an envelope addressed to the Collector, at Richmond. This proof convinces me that the return was actually placed in the Post Office in Richmond on March 15, 1947.

Testimony introduced by the Government shows that the return was actually received in the Collector's Office in Richmond on March 20, 1947. While no one was able to testify as to the actual receipt of the return, it was shown that the practice of the office of the Collector at that time was to separate the mail received in the period around March 15 according to the date on which it came into the office and to mark the various bundles of mail with the date of receipt. Later when the envelopes were opened each return was stamped as received on the date corresponding to that shown. The receipt stamp of the Collector shows that this return was received on March 20, 1947. The evidence causes me to conclude that the return was actually received in the Collector's office on the last mentioned date.

The return having been made on the basis of the calendar year was required to be filed on or before the 15th day of March, 1947. Title 26, Section 53(a)(1). However, subsection (2) of the last mentioned statute provides that the Commissioner of Internal Revenue may grant a reason-

able extension of time for filing returns under the rules and regulations approved by the Secretary of the Treasury and it was testified that for the specific year in question a return received on March 20 was regarded administratively as being filed within the time limit. * * *"

The defendant attacks this finding as contrary to the weight of the evidence. He points out that it was conclusively shown that the return was prepared by the accountant and signed and left by the defendant in Richmond on March 15 to be filed by the accountant with the Collector in that city; and that there was evidence tending to show that on the same day the paper was placed in the hands of an employee of the accountant to be mailed and that it was the practice of the office to deposit returns in the post office promptly when they are prepared on or near the due date; and that the Post Office Building was adjacent to and connected with the office of the Collector by a tunnel and that the Collector's mail was placed in movable containers and pushed through the tunnel and delivered to the Collector at his offices on the fourth floor; and that a letter addressed to the Collector and deposited in the post office at Richmond on Saturday, March 15 would have been delivered to him in the ordinary course of business on Monday, March 17.

This evidence is not without persuasive force, but there was countervailing proof. Not only was there wanting any witness who had personal recollection of placing the return in the post office on March 15, but there was positive evidence that the return of the defendant bore the receipt stamp of the Collector's office showing that it was received by him on March 20, and that it was the practice of the Collector to stamp each bundle of mail, containing approximately 100 items, with the date of its receipt, and to stamp the same date upon each return when it was taken from its envelope. In view of this testimony, it is clearly impossible

for us to say that the District Judge was wrong when he made the ultimate finding that the defendant's return was actually received by the Collector on the last mentioned date. We considered a somewhat similar state of facts in Kiker v. Commissioner, 4 Cir., 218 F. 2d 389.

The evidence, bearing on the contention that the complaint filed by the United States Attorney on March 20, 1953 was invalid, was not controverted. United States Commissioners are authorized by 18 U.S.C. § 3045 to issue warrants of arrest for violations of internal revenue laws upon the complaint of the United States Attorney; and preliminary proceedings with respect to the issuance of complaints and warrants in a criminal prosecution are regulated by Rules 3 and 4 of the Federal Rules of Criminal Procedure, which are as follows:

"Rule 3. The Complaint.

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

"Rule 4. Warrant or Summons upon Complaint.

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue."

In the pending case the United States Attorney, acting under the instructions of the Department of Justice, appeared before the United States Commissioner on March 20, 1953 and presented a complaint in which he charged that the defendant "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States for the calendar year 1946, by filing and causing to be filed a false and fraudulent income tax return wherein he stated that his net income for said year was the sum of $17,254.49 and that the amount of tax due thereon was $4,383.88, whereas, as he then and there well knew, his net income for said year was $27,-921.60, upon which said net income he owed to the United States an income tax of $9,729.77. And the complainant further stated that he believes there are material witnesses in relation to this charge." The United States Commissioner administered an oath to the United States Attorney who swore that the facts stated in the complaint were true and, in accordance with his usual custom in similar cases, requested the Commissioner to issue a summons instead of a warrant of arrest, and thereupon the Commissioner issued a summons to the defendant to appear before him on April 15, 1953. The defendant, however, did not appear because in the meantime the indictment was filed on April 9, 1953.

The United States Attorney made an oath to the facts set out in the complaint, and did not purport to be acting upon information and belief. As a matter of fact, he had personal knowledge of the facts set out in the complaint since he was present before the Grand Jury in April, 1952, when the same case was previously considered, and heard the defendant, who also appeared before the Grand Jury at his own request, testify at length. The United States Commissioner, however, did not question the United States At-

torney as to the sources of his information when the summons was issued, but assumed that the United States Attorney, as the prosecuting officer of the court, had sufficient knowledge to make the complaint and swear to it.

The argument of the defendant rests upon the ground that it is the historic function and duty of a committing magistrate before issuing a warrant of arrest for crime to make inquiry of the complainant in order to ascertain whether there is probable cause to believe that a crime has been committed, and that the offender is the party against whom the warrant is sought. Chitty's Blackstone, Vol. 2, Ch. 21, pp. 234-5; or as Judge Hincks puts it in United States v. Dolan, D.C. Conn., 113 F. Supp. 757, 761, the United States Commissioner is a judicial outpost in our constitutional structure of defense against arbitrary executive action and is often the first judicial officer responsible for the enforcement of the prohibition of the Fourth Amendment against the issuance of warrant except upon probable cause supported by oath or affirmation. Hence it becomes the duty of the Commissioner, when complaints are made only upon information and belief, to make inquiry of the complainant as to the sources of his information and the grounds of his belief so as to enable the Commissioner to determine in his own mind whether there is probable cause to believe that an offense has been committed, and thereby avoid the issuance of process and the arrest of an accused upon the mere suspicion of an irresponsible person. See Rice v. Ames, 180 U.S. 371; United States v. Gokey, D.C.N.D.N.Y., 32 F. 2d 793.

Bearing these rules in mind, however, we do not think it can be said that the complaint filed in this cause by the United States Attorney and the summons of the Commissioner based thereon were invalid and ineffective to mark

the beginning of the prosecution. It may be noted at the outset that the case does not run counter to the prohibition of the Fourth Amendment against unreasonable seizures of the person because no arrest of the defendant was sought by the Government or authorized by the Commissioner, and no arrest was actually made upon the complaint; but even if it be assumed that §4 of the Rules of Criminal Procedure makes the prohibitions of the Fourth Amendment applicable to summons as well as to arrest, the Commissioner was justified in issuing the summons in this case upon the affidavit of the qualified prosecuting officer who was especially authorized by the statute to institute the prosecution and purported to act upon actual knowledge of the facts and not merely upon information and belief. A similar conclusion was reached by Judge Hincks in the Dolan case. We do not doubt that it would be the better part of wisdom for the Commissioner in every case to make inquiry, in order to ascertain the extent of the complainant's knowledge, so as to be assured of the existence of probable cause. Had he done so in this instance the present contention could not have been made; but it cannot be said that he acted without probable cause in issuing the summons merely because he accepted the affidavit of the United States Attorney at its face value and did not cross examine him as to the extent of his knowledge. In Brinegar v. United States, 338 U.S. 160, 175, the court said: "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

Affirmed.